

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY PURVIS

Claimant

VS.

PENWELL-GABEL FUNERAL HOME

Respondent

AND

**TRAVELERS INDEMNITY CO. OF
CONNECTICUT**

Insurance Carrier

Docket No. 1,039,863

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 25, 2008, preliminary hearing Order for Compensation entered by Administrative Law Judge Brad E. Avery. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Ronald A. Prichard, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had been harassed at work regarding his workers compensation claim and later had been taken off work by Dr. Lynn Curtis. The ALJ ordered respondent to pay claimant temporary total disability compensation from April 6, 2008, until further order, or until claimant is certified as having reached maximum medical improvement, released to his regular job, or returned to gainful employment, whichever occurs first. The ALJ also ordered respondent to pay for claimant's medical treatment with Dr. Stechshulte.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 24, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ exceeded his jurisdiction in ordering it to pay temporary total disability benefits. Respondent contends that the ALJ's finding that claimant was harassed at work was unfounded. Respondent also argues the requirements of K.S.A. 44-510c(b)(2) have not been met in that until June 23, 2008, no physician had taken claimant completely off work. Further, respondent asserts that the June 23, 2008, off-work slip relies not only on claimant's work-related shoulder injury but on a low back injury that is not a part of this docketed claim. Respondent contends the testimony the ALJ relied on was not sufficient to support his orders.

Claimant contends the Board lacks jurisdiction to consider an order granting temporary total disability benefits during an appeal of a preliminary hearing. Accordingly, claimant requests this appeal be dismissed.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over the issues in this appeal?
- (2) Were the requirements of K.S.A. 44-510c(b)(2) met? If not, did the ALJ exceed his jurisdiction in ordering respondent to pay claimant temporary total disability benefits?
- (3) Did the ALJ exceed his jurisdiction in ordering respondent to pay claimant temporary total disability benefits when claimant left his job due to alleged harassment at work?

FINDINGS OF FACT

Claimant began working for respondent on May 15, 2007, as a groundskeeper. He began having problems with his left shoulder early in the year 2008, which he attributed to shoveling and using the weed eater. His shoulder problems progressed, and he was sent by respondent to see Dr. John Gilbert, who placed restrictions on him of no use of his left arm. He saw Dr. Gilbert a second time, at which time he was placed on light duty. Claimant began picking up trash at work using his right arm only. He is not claiming that respondent violated his restrictions.

Claimant contends that his supervisor, Kenny Wessel, harassed him after he was given restrictions. He states that Mr. Wessel would bug him, telling him he had better not catch him using his left arm "or else."¹ Claimant never used his left arm in the two months he worked for respondent after receiving his restrictions, but Mr. Wessel continued to tell

¹ P.H. Trans. at 13.

him not to use the arm. He contends he never reported Mr. Wessel's conduct to anyone at respondent because he was afraid of being fired. Claimant testified he just got tired of the harassment and stopped going to work, with his last day of work being April 1, 2008. He did not inform anyone that he was quitting his job; he just failed to show up.

Claimant was seen by Dr. Lynn Curtis on May 13, 2008. At that time, claimant told Dr. Curtis about the pain he felt in his shoulder. Claimant also told Dr. Curtis that he had a slip and fall injury at work in March 2008 that resulted in back pain. After examining claimant's left shoulder and back, Dr. Curtis diagnosed him with rotator cuff tendinitis of the left shoulder and an aggravated back injury with low back pain and right SI joint pain. He restricted claimant to light duties that would have to be modified because he could not lift with his left shoulder. He also gave claimant restrictions concerning his low back.

Claimant returned to see Dr. Curtis two more times after his initial visit. After his second visit, claimant was unable to find a job within his restrictions. He saw Dr. Curtis again on June 23, 2008, at which time Dr. Curtis filled out a form for the Kansas Department of Social and Rehabilitation Services that indicated that claimant had been diagnosed with a left rotator cuff tear and an aggravation of two disc herniations and was unable to work.² He admits that before that date, no doctor had taken him off work completely. He also stated that he was not examined by Dr. Curtis on either of his visits after the initial examination of May 13. On June 23, he told Dr. Curtis that he was trying to get benefits.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510c(b)(2) states:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care

² P.H. Trans., Cl. Ex. 3.

provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2007 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,³ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

³*Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁴

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁶

ANALYSIS

The issues raised by respondent in this appeal do not give rise to any issue that the Board has jurisdiction to review at this stage of the proceedings. It is not disputed that claimant suffered personal injury by accident at work, and no defenses are raised as to the compensability of claimant's work-related injury. Rather, respondent argues that claimant is not temporarily and totally disabled as that term is defined by the Workers Compensation Act and is not entitled to temporary total disability compensation. However, those are not issues the Board can consider on an appeal from a preliminary hearing order. An ALJ has the jurisdiction and authority to award temporary total disability compensation upon a preliminary finding that the claim is compensable and that claimant is temporarily and totally disabled from engaging in substantial gainful employment. Therefore, the ALJ did not exceed his jurisdiction in awarding preliminary benefits.

CONCLUSION

The Board is without jurisdiction to decide the issues presented. Accordingly, this appeal must be dismissed.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that this appeal from the Order of Administrative Law Judge Brad E. Avery dated July 25, 2008, is dismissed.

IT IS SO ORDERED.

⁴ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁵ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁶ K.S.A. 2007 Supp. 44-555c(k).

Dated this _____ day of September, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Roger A. Fincher, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge